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No. 06-376

In the

Supreme Court of the United States

JOHN F. HINCK and PAMELA F. HINCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

I. The Principles of Exclusivity Control this Case

At issue is whether §6404(h) gave the Tax Court exclusive review over *all* §6404 claims. If so, then it repealed by implication the, then-recognized, §§1346(a)(1), 1491(a)(1), and 7422(a) *refund* jurisdiction of the United States Court of Federal Claims ("Claims Court") and the district courts over §6404(e)(1) and other §6404 claims.

When addressing two statutes that appear to conflict or overlap, this Court first addresses the doctrine of implied-repeal for congressional intent and to see if the statutes can co-exist. Only if they cannot co-exist in harmony and Congress did not clearly intend to repeal the earlier statute will this Court then turn to other maxims of statutory construction. *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Internat'l, Inc.*, 534 U.S. 124, 143-44, 155-56 (2001).

Instead, the United States relies on the *Preiser* Rule to assert that Claims Court and district court refund jurisdiction has been preempted by §6404(h) – "a precisely drawn, detailed statute preempts more general remedies" – which is a principle of exclusivity applied almost exclusively in civil rights and quiet title actions. *Preiser v. Rodriguez* , 411 U.S. 475 (1973). That maxim uses an analytical approach similar to implied repeal, but is inapplicable here and, even when applied, proves §6404(h) did not preempt Claims Court and district court refund jurisdiction over §6404(e)(1) abatement claims.

A. Exclusive Tax Court Review Would Impliedly Repeal Existing Refund Jurisdiction in the Claims Court and District Courts

An implied repeal will only be found where provisio in two statutes are in "irreconcilable conflict" or, thou inapplicable here, where the latter covers the whole subje of the former and "is clearly intended as a substitut *Branch v. Smith*, 538 U.S. 254, 273 (2003), *quoting Posad v. Nat'l City Bank*, 296 U.S. 497, 503 (1936).

"[R]epeals by implication are not favored." *Univ. Inter Shuttle Corp. v. Wash. Metro. Area Transit Comm'n*, 3 U.S. 186, 193 (1968). There is a "powerful presumptio against and this Court requires "strong support" to find implied repeal. *Lockhart v. U.S.*, 126 S.Ct. 699, 704 (200 *Zedner v. U.S.*, 126 S.Ct. 1976, 1989 (2006). In 2003, Justi O'Connor surveyed the history of this Court and could fi no "implied repeal of a statute since 1975. ... [a]nd outsi the antitrust context, [none] since 1917." *Branch*, at 27 O'Connor, J., concurring in part, dissenting in part. Nor c Counsel find any since.

1. THERE IS NO IRRECONCILABLE CONFLICT HERE

When two statutes are capable of co-existing, it is t duty of the courts to regard each as effective, *Radzanow v. Touche Ross & Co.*, 426 U.S. 148, 155 (1974), citi *Morton v. Mancari*, 417 U.S. 535, 551 (1974), and t presumption is that the earlier is intended to remain force. *U.S. v. Burroughs*, 289 U.S. 159, 164 (1933). Impli repeal will be found only if necessary to make the lat statute work, and then "only to the minimum exte necessary." *Radzanower* at 155. "The better reading is give each provision a separate sphere of influence." *Branc* at 296, O'Connor, J., concurring in part, dissenting in par "Redundancies across statutes are not unusual events i drafting, and so long as there is no 'positive repugnanc between the two laws ... a court must give effect to bot

Connecticut Nat'l Bank v. Germain , 503 U.S. 249, 253 (1992), *citing Wood v. U.S.*, 41 U.S.(16 Pet.) 342, 363, 10 L.Ed. 987 (1842)). Further, the rules against implied repeals have even greater force where repeal is implied not from the enactment of an independent statute, but from revisions of portions of statutory schemes. *Watts v. Hadden*, 651 F.2d 1354, 1382 (10th Cir. 1981).

There is no positive repugnancy between the §6404(h) grant of jurisdiction to the Tax Court and the existing refund jurisdiction of the Claims Court and district courts *unless* the Tax Court's jurisdiction is deemed exclusive.[1] In *Beall* the Fifth Circuit recognized that "the more natural interpretation of §6404(h) is that Congress simply chose to extend concurrent jurisdiction to the Tax Court over a certain class of claims." *Beall v. U.S.*, 336 F.3d 419, 429 (2003).

1. CONGRESS HAD NO CLEAR AND MANIFEST INTENT TO REPEAL THE EXISTING REFUND JURISDICTION OF THE CLAIMS COURT AND DISTRICT COURTS

Where two overlapping statues can co-exist harmoniously within the established statutory scheme, then an implied repeal will only lay where there is "a clearly expressed congressional intention." *Mancari*, at 551. Congressional intent to repeal must be "clear and

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[1] Tax Court jurisdiction under §6404(h) applies to the IRS's failure to abate interest under any of the subsections of §6404, and is not limited to abatements under §6404(e)(1). For example, the Tax Court has jurisdiction under §6404(h) to hear an appeal regarding §6404(a) abatement claims. *Woodral v. C.I.R.*, 112 T.C. 19 (1999). This includes abatements of interest accrued on income taxes. *Boyd v. C.I.R.* , T.C. Memo 2000-16. Both *Selman v. U.S.*, 941 F.2d 1060 (10th Cir. 1991) and *Horton Homes, Inc. v. U.S.* , 936 F.2d 548 (11 th Cir 1991) found refund jurisdiction but held that review of (e)(1) cases was precluded because that provision was discretionary, and noted that, by comparison, review of a §6404(e)(2) case was not so precluded.

manifest." *U.S. v. Borden Co.*, 308 U.S. 188, 198 (193
quoting Red Rock v. Henry, 106 U.S. 596, 602 (1883).

Congress made no clear, manifest expression of inte
to repeal the then-existing §6404 refund jurisdictio
including §6404(e)(1) refund jurisdiction, of the Clain
Court and the district courts when it enacted §6404(h). Tl
legislative history said no inferences should be drawn. Pe
App. 63. "Inferring repeal from legislative silence
hazardous at best" and increases the possibility for erro
Cook County, Illinois v. U.S., 538 U.S. 119, 132 (2003).

Not only was repeal not clearly manifest, but, as th
Fifth Circuit recognized, by enacting §6404(h) Congre
removed the barriers to district court review upon which th
Horton Homes cases relied. *Beall* at 428. Subsequent
1996, it can no longer be asserted that §6404(e)(1) refun
determinations are totally discretionary and, thus, th
Claims Court and district courts are no longer preclude
from exercising their refund jurisdiction over those claim

In the absence of some affirmative showing of intent
repeal, the only permissible justification for a repeal b
implication is when the two statutes are irreconcilabl
Mancari, at 551, *citing Georgia v. Pennsylvania R. Co.*, 32
U.S. 439, 456-457 (1945). Here §§1346(a)(1), 1491(a)(1), an
6404(h) fit within traditional complementary scheme of ta
controversy jurisdiction articulated in *Flora v. U.S.*, 35
U.S. 63, 74 (1958). The Claims Court and district court
have refund jurisdiction and the Tax Court has pre
payment jurisdiction over §6404 claims, includin
§6404(e)(1) claims. Because there is no express, explic
language or even indication that Congress intended anothe
jurisdictional scheme, a repeal by implication cannot lay.

Moreover, none of the authorities cited by the Unite
States in response and in support of implied repeal
§1346(a)(1) and 1491(a)(1) refund jurisdiction ove
§6404(e)(1) claims are implied repeal cases. The Unite

States' implied repeal authorities are all *Preiser* Rule cases.

A. The *Preiser* Rule Does Not Apply Here

To avoid the disfavored doctrine of implied repeal, the United States asserts the *Preiser* Rule, which does not apply in a case such as this.

The *Preiser* Rule cases, including the authorities cited by the United States (with the exception of the two tax cases), address whether a later statute or statutory scheme preempts common-law or inapplicable statutory remedies. In those cases, claimants (for various reasons including seeking enhanced damages, avoiding expired statutes of limitation, or avoiding burdensome administrative requirements) rely not on the particular statute in question but on other, more general remedies to obtain relief. *See e.g., Block v. North Dakota*, 461 U.S. 273, 280, 281-2 (1983); *Brown v. G.S.A.*, 425 U.S. 820, 826-828 (1976).

These "artful pleadings" had been asserted in the past because there had been no statutory cause of action and/or effective judicial enforcement mechanism. Over time, these alternative remedies were found to be fatally flawed for two basic reasons: (i) the earlier statutory authority upon which the action was brought did not encompass the claim at issue, or (ii) the statutory and/or common-law causes of action lacked a waiver of sovereign immunity and/or grant of jurisdiction. *See e.g., North Dakota*, 461 U.S. at 281-2 (no waiver of immunity prior to passage of the Quiet Title Act ("QTA") and judicial narrowing of the scope of "officer's suits" circumscribed that cause of action); and *Brown*, 425 U.S. at 826-28 (§717 of Title VII did not protect federal employees, administrative remedies were ineffective because immunity had not been waived, and there was no jurisdictional basis to support suit on alternative remedies).

The *Preiser* Rule addresses whether enactment of a more precisely drawn, detailed statute preempts these more

"general," "artfully pled" remedies. But the *Preiser* Ru does not *per se* establish that a later "precisely drawn ar detailed statute preempts more general remedies." *E.g Brown*, at 833, *citing Johnson v. Railway Express Agenc* 421 U.S. 454 (1975)(distinguishing an earlier case that he Title VII was not exclusive because sovereign immunity ha been waived for other remedies and legislative histo manifest intent to allow individuals to also pursue oth state and federal statutory remedies). The key issue, as evident from *Brown*, *North Dakota,* and other *Preiser* Ru cases, is whether Congress intended the later-enacte statutory cause of action to comprehensively supplant th other inapplicable and/or flawed remedies.

The initial consideration in making that determinatio is whether Congress believed, at the time it enacted th more precise, detailed statute, that no remedy existed at a or the other remedies were *fundamentally* flawed becaus they lacked a waiver of immunity or grant of jurisdictio *E.g., North Dakota* , at 285. The answer to that questio proves the *Preiser* Rule has no application in this case.

The unanimous judicial determination prior to §6404(h was the Tax Court lacked jurisdiction over §6404 claim including §6404(e)(1) claims. This was because there was n express jurisdictional grant in the Tax Code as required b §7442 and abatement claims were not encompassed by an of the Tax Court's other jurisdictional grants. *See 50 Clinton Street Corp. v. C.I.R.* , 89 T.C. 352 (1987 Consequently, § 6404 actions in the Tax Court wer fundamentally flawed.

However, an alternative statutory mechanism fo judicial access did exist prior to enactment of §6404(h), pay-and-sue refund claim based on §§1346(a)(1) an 1491(a)(1) jurisdiction. Every court to reach the issu recognized that interest accrued as a result of IRS errors o

delays fit squarely within the scope and language of §§1346(a)(1), 1491(a)(1), and 7422, which waived sovereign immunity and established jurisdiction over those §6404(e)(1) claims. The United States has not challenged that underlying refund jurisdiction determination. Moreover, under the *Selman* and *Horton Homes* analysis, the other "shall abate" §6404 subsections faced no impediment to a refund action once paid.

Preiser Rule determinations also turn on the policy reasons and purpose underlying the statute at issue. *See Preiser* at 489-90; *North Dakota*, at 283-4. Here, there is no evidence that Congress had a specific policy it was trying to achieve or special purpose it was trying accomplish by preempting (or repealing) Claims Court or district court refund jurisdiction over abatement claims. To the contrary, the stated policy and purpose behind the original enactment of §6404(e)(1) and the general purpose of the 1996 amendments was to expand taxpayer rights and remedies.

In 1986, §6404(e)(1) was enacted with the stated purpose of giving the IRS a tool to abate excessive interest accrued as a result of IRS errors or delays – which the IRS had refused to do. H.R. Conf. Rep. 99-841, 2nd Sess. II-810, 1986-3 C.B. Vol. 4, 810, 1986 WL 31988, **4898-9. Ten years later, as a part of the aptly titled Taxpayer Bill of Rights II ("TBOR2"), Congress revisited the interest abatement issue in the context of comprehensive legislation aimed at *increased* protection of taxpayer' rights in complying with the tax laws and in dealing with the IRS. H.Rep. 104-506, 2nd Sess. 22, 1996-3 C.B., 70. It would be inconsistent with the stated purpose of this legislation to *narrow* judicial review of IRS abatement denials by preempting refund jurisdiction over abatement claims.

Preemption of refund jurisdiction over §6404 claims would also, for the first time, require a completely ludicrous splitting of the litigation of an abatement review under

§6404(a), which refers to abatements of tax liabilities whe the tax liability (including interest) is excessive, assess after the statute of limitations expired, or is erroneously illegally assessed. If exclusive, a taxpayer would have challenge the failure to abate the interest in the Tax Cou and sue for refund of the tax after payment in Claims Cou or district court, where jurisdiction already exists over bot the tax and interest refund portions. This outcome contrary to the general intent behind TBOR2.

The legislative history specific to §6404(h) lacks ar evidence that Congress intended to provide a new schem that would supplant Tax Court jurisdiction over existin Claims Court and district court refund jurisdiction wit respect to §6404 claims. That history begins with statement of current law – "[f]ederal ***courts*** generally d not have the jurisdiction to review IRS's failure to abat interest."[Emphasis added]. H.R.Rep. No. 104-506, at 2 (1996). Pet.App. 62-3.

This statement is true on its face with respect to th Tax Court.

This statement may even be construed as reasonabl accurate, despite the misuse of the term "jurisdiction based on the determination that §6404(e)(1) abatement wa totally discretionary with the IRS. This determination ha been made not only with respect to the Claims Court an the district courts, but also with respect to the Tax Court *Bax v. C.I.R.* , 13 F.3d 54, 58 (2 nd Cir. 1993)(extendin *Selman* and *Horton Homes* preclusion to Tax Cour jurisdiction, if any).

This statement is also accurate for pre-paymen jurisdiction to review a denied abatement request unde §§6404(a)(1), (2), and (3); §6404(d); §6404(e)(2); §6404(f); o §6404(g), some of which are mandatory. But for thes provisions (other than §6404(g) enacted in 1998), the ol pay-and-sue remedy under §1346(a)(1) and/or §1491(a)(1)

was available. Any claim for abatement of unpaid interest under §6404(a)(1), (2), or (3), once paid, becomes nothing more than a routine refund claim under §1346(a)(1) and 1491(a)(1). And, as *Selman Horton Homes* both noted, §6404(e)(2) abatements are not discretionary.

The remainder of the *Preiser Rule* analysis turns on whether the statute is "precisely drawn [and] detailed," which may reflect Congressional intent to make the new enactment a comprehensive, exclusive remedy and foreclose other remedies. *Preiser*, 411 U.S. at 489. The question is whether the statutory framework of the later act is so comprehensive and complete that allowing claimants to bring an action under more general remedies would be inconsistent with that carefully tailored new scheme and leave it superfluous.

Congressional intent to comprehensively supplant more general remedies must be express, must be supported by clear and convincing evidence, and the burden of proving that Congress has expressly withdrawn the more general remedy is on the defendant. *Smith v. Robinson*, 468 U.S. 992, 1012 (1984); *Wright v. Roanoke Redevelopement & Housing Auth.*, 479 U.S. 418, 423 (1987). The United States has not met that burden here.

Some of the factors reviewed in that respect include: the size and complexity of the statute, whether provisions of the statute indicate a specific Congressional purpose that would be thwarted by allowing more general remedies, and the "balance, completeness and structural integrity" of the statute.

For example, in *Brown*, the Court examined §717 of Title VII of the Civil Rights Act of 1964, a complex provision that created a new cause of action allowing federal employees, *for the first time*, to sue the government in discrimination cases. The statute created a new commission with extensive, specific enforcement powers and created

rigorous, exhaustive administrative requirements and tir limitations that governed those actions, including multip layers of administrative review and multiple limitatio periods for filing suit. The statute stated that the provisio regarding judicial review shall govern action brought und that section of Title VII. The Court commented that "[would require the suspension of disbelief to ascribe Congress the design to allow its careful and thorou remedial scheme to be circumvented by artful pleading."

In *North Dakota*, the Court examined the Quiet Tit Act, another lengthy statute designed to replace the mo general "officer suit" remedy, which lacked a waiver immunity. The QTA is comprised of multiple subsectio specifically negotiated between Congress and the Justi Department to achieve specific goals, including: limiting tl waiver of immunity by excluding certain lands, allowing tl option of money damages instead of surrendering propert making the remedy prospective only, and shortening tl limitations period.

Here, §6404(h) was necessary because §7442 requir Tax Court jurisdiction to be expressly set out in the Ta Code. That provision is only one sentence long, with thr short "Special Rules." While the terms in that provision a detailed, even a cursory survey of other Tax Cou jurisdictional grants makes it clear that they a consistently precise and excruciatingly detaile *E.g.*, §6213(a) and 7481(c).

The specific terms of §6404(h) do not evidence ar intent to create a new scheme to supplant the we established pre-payment post-payment scheme recognize in *Flora*. Nor is there any evidence of intent to replace tl refund claim alternative for all §6404 abatement actions.

For example, the 180 day limitations period consistent with the existing scheme of shorter limitatio periods for seeking pre-payment review in the Tax Court

Moreover, the direction to review IRS abatement denials for abuse of discretion is not indicia of a new scheme, but a codification of the existing, common-law standard used to review IRS determinations*E.g., Copeland v. C.I.R.*, 290 F.3d 326, 332 (5th Cir., 2002).

In 1986, Congress enacted §6404(e)(1) but did not expressly identify a standard by which to review IRS abatement denials. The *Selman* and *Horton Homes* cases found this lack of a standard for review to be indicative of total discretion.

But Congress has historically not expressly set out the standard to use in reviewing IRS determinations. Previous penalty provisions, did not specify the standard of review. §§6659, 6660, and 6661. In 1989, Congress replaced those penalties, among others, with a single penalty, §6662, partially to "eliminate" the IRS's habit of "stacking" multiple penalties on a single deficiency. *See* H.R.Rep. No. 101-247, at 1388 (1989), *reprinted in* 1989 U.S.C.C.A.N.1906, 2858-59. Congress again saw no need to state the standard for judicial review of that penalty. Nonetheless, IRS penalty determinations are reviewed for abuse of discretion. *E.,g., Addington v. C.I.R.*, 205 F.3d 54, 62 (2nd Cir., 2000).

Codification of the abuse of discretion standard was a response to *Selman* and *Horton Homes*, not evidence of a new scheme or statutory framework. No additional statutory provision was or is necessary to establish the standard of review for the Claims Court and district courts now that Congress has clarified that the familiar abuse of discretion standard is to be applied to all §6404 abatement claims.

As with implied repeal, the *Preiser* Rule should not be lightly used when the "new" statute is not independent, but a revision to an existing statutory scheme. *Watts*, 651 F.2d at 1382. The "balance, completeness and structural

integrity" of §6404(h) cannot be properly determin without considering the jurisdiction of the Tax Court, t Claims Court, and the district courts in the existing t controversy scheme. Under that scheme, the Tax Court h pre-payment jurisdiction over tax matters and the Clair Court and district courts have post-payment refu jurisdiction over those same tax matters.

The government erroneously asserts this scheme has place in §6404(e)(1) jurisdiction because abatement excessive interest is collateral to or incident to t underlying liability. But as explained in the Hincks' openi brief, by statute interest is a part of tax. §6601. Intere determinations, especially excessive intere determinations, are integral to the substanti determination of the amount of the liability and are n incident to the substantive liability.

The factors for determining whether a "specific statu preempts more general remedies," are not limited to impli repeal or *Preiser* Rule determinations. When faced with tv competing statutes of limitation, the Court has used the factors to determine which controls. *U.S. v. A. S. Kreid Co.*, 313 U.S. 443 (1941). But the United States overstat *Kreider* and *Romani*[2] to assert they are tax applications the *Preiser* Rule. In both cases, the Court did not hold th one tax related statute impliedly repealed or preempt another, but used the factors to harmonize the two statute

The same harmony can only be reached here b interpreting §6404(h) to grant the Tax Court pre-payme jurisdiction and the Court of Claims and district cour post-payment jurisdiction over §6404 claims, includi §6404(e)(1) claims.

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[2] *Smith v. Robinson* is not a tax case.

II. Anomalies Foreseen by the Fifth Circuit are Evident in this TEFRA Partnership-Related Case

This is a TEFRA partnership-related case, which explains why many of the United States' assertions are factually and legally incorrect.[3]

The Hincks were parties to the §6226 TEFRA partnership-level case for 1986. Pet. App. Supp. 78. In a §6226 TEFRA partnership-level case the Tax Court can only adjust and allocate partnership items. §6226(f). It cannot make tax determinations. The Hincks ceased to be parties to that case when they settled their partnership items with the IRS. §§6226(d), 6229(f), 6231(b)(1)(C).

Under TEFRA, once a partner's partnership items are adjusted, by Tax Court decision or agreement, as here, the IRS may generally compute the resulting tax and interest liabilities, if any, and assess them without further opportunity for pre-payment review as it did to the Hincks. The IRS first notified the Hincks of their liability in 2000, 13 years after their 1986 return was filed and years after 1989-1993, the abatement period they seek under §6404(e)(1). Generally, a TEFRA partner cannot contest whether the IRS properly applied the adjustments or made other errors in recomputing and assessing the liabilities until he has paid them in full and filed a refund claim.[4] He may then raise these issues, for the first time, in refund litigation, as the Hincks did here.

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[3] The partnership procedures codified at 26 U.S.C. §§6221-6234, as enacted by the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324 and as thereafter amended.

[4] Since 1999, a new, very limited pre-payment venue review may be available via a collection due process (CDP) hearing before a levy is issued or after a lien is filed against a taxpayers assets. §§6320 and 6330.

C. No Agreement to Tax Liability

The United States errs in stating that the IRS "ma an agreed adjustment to petitioners' 1986 [tax] liabilit The Hincks agreed to adjust their partnership items. Tl United States makes the common error of referring to a agreement to adjust partnership items as an agreement a tax liability. There was no agreement as to the ultima tax liability.

D. Claim Splitting

The United States may be technically correct when says that most "taxpayers litigate their tax disputes in tl Tax Court, and those taxpayers must split their claims any event, since an interest abatement claim does not ripe until after the Tax Court has determined that a deficien exists." But this is simply not true in TEFRA cases. In tl Hincks' partnership-level case, the Tax Court could on adjust and allocate partnership items. §6226(f). It could n determine their tax deficiency. The IRS then assessed tl tax and interest without further pre-payment opportuni for Tax Court review. The Hincks' only recourse to mathematical or substantive assessment error was to pa and sue for refund, as here and in the other AMCOR case In addition to the §6404(e)(1) claim common to all AMCO plaintiffs, *Weiner v. U.S.*, 389 F.3d 152 (5th Cir. 2004), al addressed a §6229(a) limitations claim and §6621(c) penal interest claim.

TEFRA partners would not be forced to "split the claims in any event" between their pre-payment bases f tax abatement and their post-payment §6404(e)(1) bases f interest abatement, as asserted by the United State because they could challenge the tax and intere assessments *only* in refund litigation. But if the Tax Court jurisdiction over §6404(e)(1) claims is exclusive, they woul be forced to split off their §6404(e) ground for refund fro any other grounds they might have that could or must l

pursued in the Claims Court or district courts. That would mean splitting the §6404 claims from the limitations claims, the §6621(c) penalty interest claims, and any other partner-specific claim bases, *e.g.* §6229(d) untimely assessments, and erroneous interest computations based on the doctrine of *Avon Products, Inc. v. U.S.*, 588 F.2d 342 (2nd Cir. 1978) or §6621(d) interest netting.[5]

B. Net Worth

The United States asserts on an erroneously narrow interpretation of §6404(e) to argue that wealthy taxpayers should not be allowed a refund forum to pursue their §6404(e)(1) claims because they can avoid any IRS errors or delays as to interest by simply paying the tax as soon as the IRS notifies them of the deficiency so that "further interest does not accrue." This misapplies the well established meaning of the phrase, "after the IRS contacts the taxpayer in writing with respect to such deficiency or payment." Congressional intent, IRS regulations, numerous Tax Court holdings, and *Beall*, the authority cited by the United States, all hold that §6404(e) claims apply to errors and delays after the IRS notified a taxpayer that his return had been selected for examination, not only after the IRS concluded an examination and notified the taxpayer of the amount due. S. Rept. No. 99-313 (1985), 1986-3 C.B.(Vol. 3) 1, 208; H. Rept. 99-426 (1985), 1986-3 C.B. (Vol. 2) 1, 844; and Conf. Rept. 99-841 (1985), 1986-3 C.B. (Vol.4) 1, 811. The Hincks, like other AMCOR partners, seek abatement for errors and delays after the IRS's first written notice of the commencement of an examination was made in late 1988 or early 1989, depending on the partnership, long before the IRS notified them of their "deficiency" many

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[5] The Hincks and Bealls were chosen to lead this §6404(e)(1) issue because they, almost uniquely among the AMCOR plaintiffs, asserted no other grounds for refunds.

years later. IRS regulations and legislative histo illustrate that errors or delays after the IRS notifies taxpayer in writing that it has selected a return for audit commenced an audit apply. Treas. Reg. §301.6404-2T(a)(2 *Examples (1) - (5)* . The Tax Court follows this approac *Landvogt v. C.I.R.*, 86 T.C.M. 108 (2003); *Jean v. C.I.R.*, 8 T.C.M. 436 (2002); *Hawksley v. C.I.R.*, 80 T.C.M. 7((2000); and *Nerad v. C.I.R.*, 78 T.C.M. 795 (1999). Whe there was no "audit" in the usual sense, the IRS's deficien notice can be the first written contact. *Pettyjohn v. C.I.I* 82 T.C.M. 461(2001); *Spurgin v. C.I.R.*, 82T.C.M. 841(2001

An ongoing question in TEFRA cases is which noti suffices, notice to the partnership or notice to the individu partner. The Claims Court has not ruled on this questio

The Hincks' only pre-payment route to the Tax Cou would have been to not pay the tax and intere assessments, wait (possibly for years while intere accrued) for the IRS to threaten them with levies or to fi a lien on their property and request a CDP hearing. F AMCOR partners assessed before 1999, even that was n available. *Weiner*, (1984 liabilities assessed in 1997); *Bea* (1984 liabilities assessed in 1997). The Hincks could n have avoided the interest by paying in 2000 when they we "first notified by the IRS that additional taxes are owed." fact, the Hincks did try to mitigate any potential interest l remitting roughly $94,000.00 to the IRS in 1996. But th wildly overestimated what they would eventually ov because they had no way to know what their final t liability would be.[6]

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[6] For AMCOR partners like the Hincks who settled on Forms 87 P(AD), the final tax liabilities were generally about half of what th would have been without the settlement. In 1996 the Hincks had no w to know what terms the IRS would settle on years later.

This Court has held that "where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973). Congress intended §6404(h) to allow pre-payment relief for "certain taxpayers," those with a net worth under $2,000,000. Relief for wealthier taxpayers would be restricted to pursuing post-payment refund claims in the Claims Court and district courts. But this Court has also held that a tax assessment without a prior hearing does not violate due process provided the taxpayer can sue for a refund after payment, and meets the minimal requirements for due process. *Bob Jones Univ. v. Simon,* 416 U.S. 725,746 (1974); *Phillips v. C.I.R.,* 283 U.S. 589, 595 (1931); *Dodge v. Osborn,* 240 U.S. 118, 122 (1916). That is all that the Hincks request.

But the United States advocates that this Court go further and establish exclusive Tax Court jurisdiction over all §6404 claims, thereby depriving many taxpayers of *any* forum to pursue otherwise available, even mandatory abatement relief, solely based on their wealth. This does not meet the minimum requirements for due process.

There is also no rational relationship in a TEFRA related case between the net-worth test and the role of interest in tax administration. Nor is denying taxpayers *any* forum to pursue their otherwise available §6404 claims based solely on their wealth is clearly in any way comparable to limiting the taxpayers who may be reimbursed for attorneys fees under §7430.

c. Prevailing Party

The Hincks agree that in the context of §6404(e)(1) claims the "prevailing party" language of 28 U.S.C. §2412(d)(1)(B) is a *non sequitur* and should not apply. But until Congress revises the language of §7430(c)(4)(A)(ii) it appears to be the law and will continue to present a potential bar to most taxpayers seeking pre-payment Tax

Court review of their denied §6404(e)(1) claims. The I
has never yet asserted that partners with TEFRA relat
liabilities are barred from seeking §6404(h) pre-payme
review in the Tax Court unless they were the prevaili
parties in the TEFRA partnership-level case. But Congr
expressly included the prevailing party limitation unc
§6404(h) and only Congress can remove it.

b. Preclusive Effect

The United States errs when it asserts that after th
claims are denied taxpayers similarly situated to t
AMCOR partners could have filed two suits – one in the T
Court to address their §6404(e)(1) claim, and another in t
Claims Court or district court, as applicable, to addr
their other grounds – and the first to be resolved wo
have no preclusive effect on the other because, under t
Federal Circuit's holding, the Claims Court and the distr
courts cannot review §6404(e)(1) claims.

First, the Tax Court has no §6404(e)(1) refu
jurisdiction. Section 6404(h)(1) authorizes the Tax Court
"order an abatement," it does not authorize the Tax Co
to order a refund. Under §6404(h)(2)(B), §6404(h) is subj
to "rules" similar to the rules for the Tax Court's refu
jurisdiction under §6512(b). But requiring similar rules d
not clearly grant the Tax Court refund jurisdiction.

Second, there is no *general* refund jurisdiction in t
Tax Court similar to §1346(a)(1), 1491(a)(1), and 7422
refund jurisdiction of the Claims Court and district cour
In a deficiency proceeding the Tax Court acqui
supplemental refund jurisdiction and its decision is
judicata for that tax year, even as to refund suits fi
before the Tax Court case. *Russell v. U.S.*, 592 F.2d 1(
(9th Cir. 1979); *Prizer v. U.S.*, 11 Cl.Ct. 184,186-87 (198

If §6404(h) grants the Tax Court exclusive jurisdicti
over *all* §6404 claims, then it might be true that

resolution in the Claims Court or district court of other issues would not be *res judicata* as to a pending Tax Court §6404 case for that tax year. But if the Tax Court's §6404 refund jurisdiction encompasses supplemental general refund jurisdiction in the same manner as §6512(b), then once attached, it would extend to the entire subject of the correct tax for that year and the Tax Court's §6404 determination would be *res judicata* as to the taxpayer's entire liability for that year.

a. Judicial Expertise

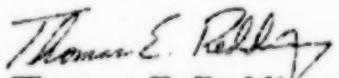
The Claims Court and the district courts also routinely review for abuses of discretion the regulatory and administrative schemes of federal agencies for errors, delays, and improper refusals to act. No expertise in substantive tax liability is required to spot errors, delays, and improper denials of abatements. A case would be subject to review by the same court of appeals whether brought in the Tax Court or a district court. *Golsen v. C.I.R.*, 54 T.C. 742 (1970). Claims Court cases are appealed to the Federal Circuit which was specifically established to review cases related to federal agencies and routinely reviews tax cases.

CONCLUSION

Congress enacted §6404(h) specifically to address the IRS's repeated bad faith refusals to make §6404 abatements and correct the frustrated judicial review of §6404(e)(1) claims. It gave the Tax Court pre-payment jurisdiction over all §6404 abatement denials. It did not intend in the TBOR2 to narrow or repeal the existing *Flora* scheme of concurrent pre-payment jurisdiction in the Tax Court and post-payment refund jurisdiction in the Claims Court and district courts.

The Fifth Circuit's analysis in *Beall* should be adopt and the judgment of the Court of Appeals for the Fede Circuit should be reversed.

Respectfully Submitted,



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APRIL 2007